Colgate-Palmolive Company *and* Oil, Chemical and Atomic Workers International Union, Kansas City, Local No. 5-114, AFL-CIO. Case 17-CA-8331

April 9, 1982

DECISION AND ORDER

On March 27, 1979, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter Respondent, the General Counsel, and Charging Party Oil, Chemical and Atomic Workers International Union, Kansas City, Local No. 5-114, AFL-CIO (herein also called the Union), filed exceptions and supporting briefs and Respondent filed an answering brief to the General Counsel's exceptions. Respondent additionally filed a request for oral argument. On December 10, 1979, the Board, having determined that this and other cases[1] involving an employer's obligations to furnish certain information regarding health and safety related data to the collective-bargaining representative of its employees presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument for January 16, 1980. Thereafter, oral argument was rescheduled to January 15, 1980, at which time Respondent, the General Counsel, the Charging Party, and *amici curiae* presented arguments.[2] The General Counsel and Respondent subsequently filed supplemental memorandums of law on the legislative history of the Act regarding trade secrets and confidentiality.[3]

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and oral arguments, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

The principal issue is whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with certain health and safety related data assertedly requested to enable the Union to perform its representational responsibilities on behalf of unit employees. As a general proposition, the Administrative Law Judge found that an employer is obligated to furnish, upon request, health and safety information because such information is particularly relevant to a union's bargaining responsibilities on behalf of unit employees. Consequently, he found that Respondent failed to bargain in good faith by unequivocally refusing to furnish the Union with any of the requested data, thereby violating Section 8(a)(5) and (1) of the Act.[4] However, with respect to the information specifically requested, the Administrative Law Judge found that Respondent violated Section 8(a)(5) and (1) by its failure to provide the Union with such data, enumerated *infra*, as was not confidential for proprietary or trade secret reasons, privileged medical information which could not be released without employee authorization, or too burdensome to retrieve or gather. As for the Union's request for employee medical records, alleged proprietary or confidential trade secret information, and data (unspecified by him) which he found would be overwhelmingly burdensome to provide in a meaningful form, the Administrative Law Judge found that Respondent properly denied the request concluding that the "furnishing of . . . [this information should be] relegated to the collective bargaining process." He therefore found no violation in Respondent's refusal to furnish such information.

Contrary to the Administrative Law Judge, we find, for the reasons set forth below, that Respondent failed to establish that providing any of the requested relevant information in a meaningful form would be so burdensome as to relieve Respondent of its obligation to do so. Also, contrary to the Administrative Law Judge, we find that Respondent's refusal to satisfy the Union's request for medical records which do not include individually identifying data violated Section 8(a)(5) and (1) of the Act. However, we agree with the Administrative Law Judge that Respondent's refusal to provide information which was not confidential violated Section 8(a)(5) and (1) of the Act and that, with respect to the alleged proprietary or trade secret information

[1] *Minnesota Mining and Manufacturing Company*, 261 NLRB 27 (1982), and *Borden Chemical, a Division of Borden, Inc.*, 261 NLRB 64 (1982).

[2] The request of the American Federation of Labor and Congress of Industrial Organizations, and its Building and Construction Trades and Industrial Union Departments to present oral argument as *amici curiae* was granted over Respondent's opposition thereto.

[3] We find nothing in the legislative history of the Labor Management Relations Act of 1947 as cited by Respondent which would indicate that Congress ever contemplated the question whether an employer, upon request, should be obligated to furnish a collective-bargaining representative with information regarding proprietary or trade secret ingredients or confidential medical records. We therefore find no basis for concluding that the findings made *infra* either ignore or override the legislative history of the Act.

[4] The issue of good faith was not specifically alleged in the complaint; rather the complaint alleged, without mention of this element, that Respondent's refusal to furnish the requested information was in violation of Sec. 8(a)(5) and (1) on the ground that such information was relevant to the Union's fulfilling its statutory obligations to the employees it represented. The Administrative Law Judge nevertheless found that the issue of good faith was inextricably intertwined with Respondent's failure to furnish the information and thus was fully litigated. In light of our finding herein, that Respondent's refusal to provide certain of the requested information violated the Act as alleged in the complaint, and inasmuch as the matter of lack of good faith on Respondent's part was not raised in the complaint, we find it unnecessary to determine whether Respondent bargained in good or bad faith concerning the Union's request and thus do not adopt the Administrative Law Judge's finding to that extent.

sought, the parties should resolve their differences through the collective-bargaining process.

As more fully discussed by the Administrative Law Judge, on November 16, 1977,[5] the Union sent a letter to Respondent requesting the following health and safety related data "in order to protect the health and lives of the bargaining unit personnel":[6] (1) morbidity and mortality statistics on all past and present employees; (2) the generic name of all substances used and produced at the Kansas City Colgate-Palmolive plant; (3) results of clinical and laboratory studies of any employee undertaken by Respondent, including the results of toxicological investigations regarding agents to which employees may be exposed; (4) certain health information derived from insurance programs covering employees, as well as information concerning occupational illness and accident data related to workmen's compensation claims; (5) a listing of contaminants monitored by Respondent, along with a sample protocol; (6) a description of Respondent's hearing conservation program, including noise level surveys; (7) radiation sources in the plant, and a listing of radiation incidents requiring notification of state and Federal agencies; and (8) an indication of plant work areas which exceed proposed National Institute of Occupational Safety and Health heat standards and an outline of Respondent's control program to prevent heat disease.[7] The parties thereafter held several meetings at which Respondent consistently took the position that it was not obligated to furnish any of the requested information. On May 10, Respondent denied the Union's request in writing, stating, *inter alia*, that it would be a tremendous burden on the Company to attempt to collect the data; that the request appeared to be a fishing expedition; and that the Company would be willing to sit down and discuss with the Union specific problems and share appropriate information regarding the health and safety of its members. The collective-bargaining agreement between the parties, effective December 1, 1976, to December 1, 1979, contains a "plant safety" provision establishing a joint safety committee for the purpose of increasing the effectiveness of the plant safety program and eliminating unsafe practices and conditions. The provision further sets out a procedure for the handling of employee safety complaints.

With respect to the morbidity and mortality information requested, the record establishes that Respondent prepares, maintains, or has available to it the following records: Occupational Safety and Health Administration (OSHA) Form 700 and its predecessor dating back to 1976, listing the instances of accidents and occupational disease in a given plant; Kansas workmen's compensation accident reports; employee absentee reports; monthly turnover reports; and life insurance claim forms. As Respondent interprets the Union's request, the Union is asking for some 9,460 morbidity records and 350 mortality records, which Respondent estimates would take about 50 "man days" to retrieve.

With respect to the employee health data sought, the following are potential sources of such information: preemployment physical examinations, including urinalysis, X-rays, and a medical history taken by Respondent on each employee; logs of employee visits to Respondent's inplant dispensary; employee medical files containing reports from company and private physicians;[8] files retained for health care insurance; and workmen's compensation files. Respondent estimates that the insurance and workmen's compensation files consist of some 12,000 documents, and contends that, like the other medical records in its possession, they contain medically confidential information. The record does not indicate that Respondent engages in periodic medical screening, the results of which would be encompassed in the Union's request for biological data. Respondent does, however, perform the following studies pertinent to the Union's request for the results of tests monitoring contaminants: monthly air sampling to monitor nuisance dust or levels of hazardous airborne materials; biannual radiation testing; noise level test (but since a 1972 plantwide test, only upon request or sometimes upon the installation of new machinery); and audiograms (given to all new employees since January 1, 1978, and to employees complaining of hearing loss upon request).

With respect to the Union's request for a list of the generic name or descriptive chemical structure of the ingredients used in the manufacture of Respondent's products, Respondent, pursuant to the Toxic Substances Control Act, is apparently required to submit such a list of chemicals to the Environmental Protection Agency. Respondent also

[5] All events herein are in late 1977 or early 1978.

[6] This letter was not prompted by safety or health problems involving Respondent, but rather was sent at the direction of the Union's International. Apparently, upon a similar request from the International, 110 of 560 locals sent identical letters to the employers of their members; less than 50 percent of these employers have resisted furnishing the information "in one fashion or another," and two employers have agreed to furnish the information as a matter of contractual obligation.

[7] The Union's request for health and safety information has been set forth verbatim by the Administrative Law Judge in his Decision.

[8] Access to the foregoing medical records which may contain information of a highly personal nature, i.e., instances of venereal disease, mental illness, or drug-related problems, is limited to the following authorized personnel: the company doctor and nurse, the plant manager, and certain specified employees within the personnel department.

has available to it the following sources of information on chemicals: results of research and development work performed by Respondent's research and development center on final products and new ingredients; computerized results of testing for the preservation of consumer safety done in conformity with the Consumer Product Safety Committee Labeling Act; and safety data sheets[9] on some 125 of the 150 ingredients used in Respondent's manufacturing process, including safety data sheets provided by suppliers on proprietary ingredients, i.e., ingredients which suppliers regard as trade secrets.[10] Respondent estimates that of the 150 ingredients it utilizes, 3 to 4 percent, including certain color or fragrance substances which give the final product a characteristic which competitors would like to duplicate, would be classified as confidential or in the nature of trade secrets. Such ingredients are not readily discoverable by a chemical analysis of the final product.

Like the Administrative Law Judge, we find that because health and safety are terms and conditions of employment, data regarding such matters is relevant to the Union's representational functions.[11] Thus, we find that Respondent unlawfully refused to provide the Union with the following health and safety data[12] (which he found would be neither too burdensome to supply nor require the disclosure of confidential information of a trade secret or medical nature): (1) all OSHA logs from 1972 to present; (2) a list of the generic name of some 130–140 chemicals or substances used in Respondent's production process which are not proprietary to suppliers and which do not constitute Respondent's trade secret ingredients; (3) safety data sheets for the aforementioned chemicals or substances; (4) safety data sheets for those proprietary chemicals or substances which do not reflect the generic name of the chemicals or substances; (5) reports on documents constituting periodic air-sampling surveys and analyses for the past 5 years; (6) documents constituting radiation survey and leak test reports for the past 5 years; and (7) computerized results of tests required by the Consumer Product Safety Commission on final formulations for the past 3 years.[13]

Unlike the Administrative Law Judge, however, we find no merit to Respondent's assertion that it was not obligated to furnish any of the requested information, including medical information in a codified form, as well as "other records of information requested by the Union" unspecified by the Administrative Law Judge, because such information would be too expensive or time-consuming to accumulate or too difficult to retrieve, i.e., "burdensome" to produce. At the outset we note that, while Respondent has estimated for each of the possible sources of information the number of documents involved and the man-hours and costs of locating and identifying the data and furnishing it to the Union, there is no evidence on the instant record to verify such estimates—certain of which in any event appear to contain exaggerations.[14] More importantly, Respondent at no time attempted to reduce the burden of accumulation by seeking clarification of the request or by apprising the Union of the extensiveness or availability of the information sought as a guide for simplifying or limiting its demand. Nor did Respondent suggest that the Union might assist in the cost of retrieval. We therefore find that Respondent was not justified in refusing to supply any of the requested in-

[9] Safety data sheets contain the following information: generic name, oral toxicity, thermal toxicity, special handling requirements, and particularly known hazards.

[10] About 10 percent of the ingredients furnished by suppliers and used by Respondent are proprietary. Apparently, suppliers sometimes refuse to furnish the generic name of such ingredients.

[11] *Gulf Power Company*, 156 NLRB 622, 625 (1966), enfd. 384 F.2d 822 (5th Cir. 1967); *San Isabel Electric Services, Inc.*, 225 NLRB 1073 (1976). There is, of course, no question that the instant parties are cognizant of their bargaining obligations in this respect, for the contract in effect at the time of the Union's demand commits the parties to, *inter alia*, mutual cooperation "in eliminating unsafe conditions and unhealthy practices," and the appointment of a joint safety committee. Further, the record herein establishes that among the chemicals to which employees at Respondent's Kansas City plant may have been exposed are such potentially hazardous substances as chloroform (a potential carcinogin), ammonia, and sulphenates or sulphates which when oxidized produce sulfadioxide, an agent regulated by OSHA.

[12] Respondent's defenses, that the Union's right to the requested information was overly broad in that it was not premised on a particular controversy and that by agreeing to a health and safety clause in the effective contract the Union waived its statutory right to such information, warrant no further scrutiny than they were afforded by the Administrative Law Judge who found them to be without merit. As noted by the Administrative Law Judge, Respondent's blanket refusal to furnish any of the data requested, unless it pertained to a particular controversy, left the Union without a "guide to assist it in framing a more limited demand, or an incentive to do so in the expectation that a more limited demand would be honored." *Fawcett Printing Corporation*, 201 NLRB 964, 975 (1973). Further, while there may be merit to Respondent's claim that the generic name of certain ingredients constitutes trade secrets, such a claim does not excuse Respondent from complying with the Union's request to the extent that it includes information as to which no adequate defense is raised. *Fawcett Printing Corporation, supra.*

[13] The Administrative Law Judge noted that a proposed OSHA rule on "Access to Employee Exposure and Medical Records" 43 F.R. 31371, July 21, 1978, should it become effective, would likewise require Respondent to furnish the Union with this data. In concluding that this and other information sought is relevant and needed by the Union for the proper performance of its duties as the employees' collective-bargaining representative, we rely not upon the obligations imposed by other agencies or statutes, but solely upon the bargaining obligations imposed by the National Labor Relations Act. Furthermore, contrary to Respondent's contention, the fact that the Union may be able to acquire this information through some independent course of investigation, as through OSHA, does not in the absence of special circumstances, defeat the Union's right to the information or alleviate Respondent's obligation to provide it. *The Kroger Company*, 226 NLRB 512, 513–514 (1976), see cases cited at fn. 9.

[14] Respondent admitted, for example, that its estimates regarding substances or materials used in the plant included compiling statistics on items such as pens, pencils, paper, and paper clips.

formation on grounds of overwhelming burden. Should it develop that the cost of supplying the Union with the information in a clear and understandable form is substantial, then the parties must bargain in good faith as to the allocation of these costs. If no agreement on allocation can be reached, the Union is entitled, to the extent otherwise provided herein, to access to records from which it can reasonably compile the information.[15]

As noted previously, the Administrative Law Judge found that Respondent's refusal to comply with the Union's request for employee medical information contained in employee medical records was justified because the release of such information without employee approval would violate the privileged physician-patient relationship. The Administrative Law Judge further found that Respondent's refusal to furnish a list of generic names of certain substances was warranted because to do so would require the disclosure of trade secrets of Respondent or its suppliers. Rather, he concluded that these were matters for resolution through collective bargaining.

In our decision in *Minnesota Mining and Manufacturing Company*,[16] issued today, we found that, when such claims of confidentiality, as here, are interposed as a defense to a union's request for information, they raise questions concerning legitimate and substantial company interests possibly requiring a finding that an employer need not disclose information of a confidential nature or at least not unconditionally disclose it.[17] We have examined the above findings of the Administrative Law Judge in light of that decision and have decided to reverse his findings relating to the employee medical records, but to affirm his findings concerning the furnishing of asserted trade secret information.

With respect to the medical confidentiality question, the Administrative Law Judge found that, in its November 16 request, the Union advised Respondent that "review of this information will be undertaken, by licensed physicians with medical confidentiality maintained with respect to any individual employee," but that during the hearing the Union "apparently verbally modified this request, stating that the names and other identifying information could be deleted and the data could be coded in a manner to protect the privacy of the individual employee."[18] Relying in part upon *Detroit Edison Co., supra*, and *United Aircraft Corporation (Pratt & Whitney Division)*,[19] the Administrative Law Judge found that the Board, pursuant to a general request,[20] would not require Respondent to divulge medical records which would identify employees, absent employee consent. Further, the Administrative Law Judge found that in its current form, and particularly in the "coded form" suggested by the Union, furnishing these records would be overwhelmingly burdensome, and "would far exceed the potential benefit to the Union of such data." We note at the outset that contrary to any inference which might be drawn from the Administrative Law Judge's findings, the Union does not seek individually identifying records. Admittedly the Union's November 16 request which offers to have a licensed physician interpret and analyze employee medical records to maintain confidentiality is somewhat ambiguous on this question. However, this is the identical language used by the Union in *Minnesota Mining and Manufacturing Company, supra*, and here, as in that case, there is ample evidence to support a finding that the Union does not seek individually identifying records.[21] As to the

[16] *Food Employer Council, Inc., et al.*, 197 NLRB 651 (1972); *Westinghouse Electric Company*, 239 NLRB 106 (1978).

[17] 261 NLRB 27.

[18] *Detroit Edison Co.* v. *N.L.R.B.*, 440 U.S. 301 (1979).

[18] While the Administrative Law Judge stated that "Respondent apparently verbally modified this request," it is clear from the record and from the context of his statement that he should have found and meant to find that it was the Union which at the hearing modified its request.

[19] 192 NLRB 382, 390, modified *sub nom. Lodge 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO [United Aircraft Corporation]* v. *N.L.R.B.*, 534 F.2d 422 (2d Cir. 1975), cert. denied 429 U.S. 825 (1976).

[20] The Administrative Law Judge suggested that Respondent was relieved of its burden to furnish this data because the Union's request, which did not specify precisely what "clinical and laboratory studies" it sought, was overly broad. However, only Respondent was privy to the contents of employee medical records and what clinical or laboratory studies might be contained therein. Thus, we do not find the Union's imprecision justified Respondent's refusal to furnish the requested information particularly since Respondent's response precluded the Union from perfecting its demand. See fn. 12, *supra*.

[21] Thus, Rafael Moure, industrial hygienist for the Oil, Chemical and Atomic Workers International Union, when asked to explain exactly what information the Union sought when it requested in par. (3) entitled "Biological" data, testified:

> We would like to know . . . if the particular company has some information on the toxicological effects of the particular chemicals being handled. Also, we would like to know if the company has established some medical screening programs of the kind that I will describe as urine samples or blood samples. We would like to know what is being looked for in this particular medical examination. We would like to know also what are the results of this particular medical examination. We talked [about] the problem of medical confidentiality in this matter. We . . . are not interested in the confidential medical records of a particular person. What we are interested in is in the gross results. We would like to see at least a list of a code that doesn't identify the person, that is what we mean by medical confidentiality will be maintained.

Moure indicated that he had experiences in devising plans to protect, through the use of a code, the confidentiality of employees' names with respect to medical records and stressed that the medical screening programs which he referred to were those which "a company feels is necessary to essentially biologically monitor if a particular chemical is affecting employees." When asked on re-cross-examination whether the union request for "all results of clinical and laboratory studies undertaken of any employee" was to be read literally, Moure replied:

> As long as it's relevant to occupational diseases, yes, we like to have the information, as long as the confidentiality of the person is respected. As you know, there are ways of avoiding identifying the particular person. We are not interested in names of people. We are interested in getting the particular conditions of a person.

Administrative Law Judge's finding that supplying medical records would be overwhelmingly burdensome, we have already considered and found generally unmeritorious Respondent's claimed defense in this regard. Further, while the coded format suggested by the Union may increase the cost of compiling medical records, it is exactly this coded format which eliminates the confidentiality concerns raised by Respondent. Finally, to the extent that supplying the Union with statistical or aggregate medical data may result in the unavoidable identification of some individual employee medical information, we find here, as in *Minnesota Mining and Manufacturing Company, supra*, and contrary to the Administrative Law Judge, that the Union's need for medical data potentially revealing past effects of the workplace environment upon those whom it represents outweighs any minimal intrusion upon employee privacy implicit in the supplying of aggregate data such as that sought.[22] Accordingly, we conclude that Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply the bargaining agent with employee health and medical information to the extent that the information does not include individual medical records from which identifying data[23] has not been removed.[24]

Respondent claims that it was justified in withholding from the Union the generic names of certain ingredients used at the Kansas City plant, either because the disclosure of such information would impinge upon Respondent's proprietary interests due to the potential revelation of its trade secrets to possible competitors, or because such information would improperly disclose proprietary ingredients of Respondent's suppliers. The Administrative Law Judge found, and we agree, that such claims of confidentiality, as substantiated by record evidence,[25] may operate as a legitimate justification for refusal to furnish relevant information, with the ultimate determination resting upon the relative merit of the conflicting positions of the parties.[26] However, having found that the generic name of substances to which bargaining unit members are exposed in their workplace constitutes information needed by their bargaining representative, we shall not engage in the full balancing of countervailing rights discussed by the Supreme Court in *Detroit Edison Co., supra*, before first affording these parties an opportunity to reach an accommodation on their own.[27] For here, where no effort toward such accommodation has been tried, good-faith bargaining may lead to acceptable methods of furnishing such information while maintaining satisfactory safeguards to preserve confidentiality.[28] The parties have enjoyed a satisfactory collective-bargaining relationship over many years and there is nothing to indicate that the instant controversy cannot be resolved to their mutual satisfaction. Obviously, they are in the best position to develop necessary methods and devices under which needed information may be furnished to the Union while maintaining appropriate safeguards to protect Respondent's legitimate proprietary interests.[29]

As we acknowledged in *Minnesota Mining and Manufacturing Company, supra*, if the Union and Respondent are unable to reach an agreement on a method whereby their respective interests would be satisfactorily protected, these parties may be before us again. If the issue of whether the parties have bargained in good faith is presented to us, we will, of course, look to the totality of the circumstances in determining whether or not both have

[22] Such information may be particularly important in the instant case since Respondent, until 1976, used the potential carcinogenic substance chloroform at the Kansas City Plant.

[23] Examples of such data may include, but are not necessarily limited to, names, addresses, social security numbers, and payroll identification numbers.

[24] In its brief to the Administrative Law Judge and again at oral argument Respondent contended that the release of medical data containing confidential information would run contrary to an individual's right to privacy, a right recognized under tort law and the laws of the State of Kansas. Inasmuch as the Union does not seek and we are not requiring release of such information, we find it unnecessary to consider further Respondent's contention.

[25] As noted above, of the 150 ingredients used in the manufacturing process at the Kansas City plant, Respondent would classify as confidential or trade secret in nature some 4 to 7 ingredients constituting color or fragrance substances giving certain of Respondent's products their unique characteristics, as well as some 15 proprietary ingredients which suppliers regard as trade secrets. While there may be substances in addition to these possibly constituting trade secrets, we regard these approximate figures as a rough guide to the number of generic names which may be legitimately exempted from disclosure pursuant to this Order. Consequently, any number of generic names substantially at variance with the evidence adduced by Respondent in this regard will be most carefully scrutinized.

[26] *Detroit Edison Co., supra; Fawcett Printing Company, supra* at 973–975.

[27] This is not, however, to avoid resolution of the controversy before us, for Respondent has not heretofore acknowledged that information of the kind sought by the Union is relevant to the latter's collective-bargaining functions absent some specific grievance or controversy. We find that it is.

[28] *The Ingalls Shipbuilding Corporation*, 143 NLRB 712, 718 (1963). Cf. *American Cyanamid Company (Marietta Plant)*, 129 NLRB 683, 684 (1960).

[29] We recognize that the generic name of proprietary ingredients of Respondent's suppliers may not always be provided to Respondent and that disclosure to the Union of such information when available raises questions concerning possible breach of confidentiality and Respondent's potential liability with respect thereto. We find, however, that since the proprietary ingredients of Respondent's suppliers, like Respondent's own trade secret ingredients, are substances to which employees are exposed in the workplace, the generic name thereof is equally relevant to matters of employee health and safety and to the Union's representational functions. We shall, therefore, treat requests for information regarding the proprietary ingredients of Respondent's suppliers the same as those regarding Respondent's own trade secrets and require the parties, through good-faith bargaining, to attempt to develop a mutually satisfactory method of satisfying such information requests.

bargained in good faith.[30] If necessary, we shall undertake the task of balancing the Union's right of access to data relevant to collective bargaining with Respondent's expressed confidentiality concerns in accordance with the principles set forth in *Detroit Edison Co., supra*. However, we believe that first allowing these parties an opportunity to adjust their differences, in light of the above findings, best effectuates the National Labor Relations Act policy of maintaining industrial peace through the resolution of disputes by resort to the collective-bargaining process.

In summary, we adopt the Administrative Law Judge's finding that Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply to the Union the health and safety information requested to the extent that such data does not include trade secrets or individual medical records from which identifying data has not been removed. Insofar as Respondent avers that supplying the bargaining agent with information sought would compromise the confidentiality of proprietary information, we first rely on the collective-bargaining process and the good-faith negotiations of the parties to determine conditions under which information may be furnished to the Union, while maintaining appropriate safeguards to protect Respondent's legitimate interests. We shall therefore order Respondent to supply to the Union the former information, and to bargain in good faith with regard to providing the latter.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Colgate-Palmolive Company, Kansas City, Kansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, Kansas City Local No. 5-114, AFL-CIO, by refusing to furnish it with information concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions, to the extent that such information does not include individual medical records from which identifying data has not been removed.

(b) Refusing to bargain collectively with Local No. 5-114 by refusing to furnish it with the generic name of all chemicals and substances used and produced at Respondent's Kansas City plant, excepting those chemicals and substances the names of which constitute proprietary trade secrets.

(c) In any like or related manner refusing to bargain collectively with Local No. 5-114, or interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Furnish Local No. 5-114 the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions to the extent that such information does not include individual medical records from which identifying data has not been removed.

(b) Furnish Local No. 5-114 the generic name of all chemicals and substances used and produced at Respondent's Kansas City plant which do not constitute proprietary trade secrets.

(c) Upon request, bargain collectively in good faith with Local No. 5-114 regarding its request for the furnishing of a list of the generic name of all chemicals and substances used and produced at the Kansas City plant, insofar as the request relates to items which are proprietary trade secrets, and thereafter comply with the terms of any agreement reached through such bargaining.

(d) Post at its Kansas City plant copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, as to what steps the Respondent has taken to comply herewith.

MEMBER JENKINS, concurring in part and dissenting in part:

I agree with the majority's finding, except that I would require Respondent to furnish to the Union the generic name of all chemicals and substances used and produced at Respondent's Kansas City

[30] *Rhodes-Holland Chevrolet Co.*, 146 NLRB 1304 (1964). Substantiation of various positions asserted by the parties would, obviously, be an important element of any such evaluation.

[31] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

plant. Respondent's concern about confidentiality is discussed in my separate opinion in *Minnesota Mining and Manufacturing Company*, 261 NLRB 27 (1982).

MEMBER HUNTER, concurring:

I concur in this Decision consistent with the views expressed in my separate opinion in *Minnesota Mining and Manufacturing Company*, 261 NLRB 27, issued this day.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Oil, Chemical and Atomic Workers International Union, Kansas City Local No. 5-114, AFL-CIO, by refusing to furnish it with the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions, to the extent that such information does not include individual medical records from which identifying data has not been removed.

WE WILL NOT refuse to bargain collectively with Local No. 5-114 by refusing to furnish it with the generic name of all chemicals and substances used and produced at our Kansas City plant, except for those chemicals and substances the names of which constitute proprietary trade secrets.

WE WILL NOT in any like or related manner refuse to bargain collectively with Local No. 5-114, or interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL furnish the aforesaid Local No. 5-114 the information it requested concerning employee health and safety programs, monitoring and testing systems, devices and equipment, and statistical data related to working conditions to the extent that such information does not include individual medical records from which identifying data has not been removed.

WE WILL furnish Local No. 5-114 the generic name of all chemicals and substances used and produced at our Kansas City plant, except for those substances the names of which constitute proprietary trade secrets.

WE WILL, upon request, bargain collectively in good faith with Local No. 5-114 regarding its request for the furnishing of a list of the generic name of all chemicals and substances used and produced at our Kansas City plant insofar as the Union's request relates to items which are proprietary trade secrets, and shall comply with the terms of any agreement reached through that bargaining.

COLGATE-PALMOLIVE COMPANY

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Kansas City, Kansas, on November 29, 1978.[1] The charge was filed on May 25, by Oil, Chemical and Atomic Workers International Union, Kansas City, Local No. 5-114, AFL-CIO (herein called the Union). On July 5, a complaint and notice of hearing was issued alleging a violation by Colgate-Palmolive Company (herein called Respondent) of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein called the Act). Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Post-hearing briefs have been filed on behalf of the General Counsel, Respondent, and the Charging Party.

Upon the entire record[2] and based on my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of Delaware corporation, is engaged in the manufacture and distribution of soap, detergents, and related items at various facilities including a facility located in Kansas City, Kansas, the facility involved herein.

In the course and conduct of its Kansas City, Kansas, business operations, Respondent annually purchases goods and services valued in excess of $50,000 directly from sources located outside the State of Kansas, and annually sells goods and services valued in excess of $50,000 directly to customers located outside the State of Kansas.

It is admitted and I find that Respodent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] All dates or time periods herein are within 1978, unless otherwise indicated.

[2] Respondent's unopposed motion to correct the transcript is hereby granted.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with potentially relevant health and safety information.

B. *The Facts*

1. Background

On October 11, 1977, the International president of the Union, herein, directed a memorandum to all local union presidents and financial secretaries, as follows:

> The events surrounding the recent discovery of sterility among OCAW pesticide workers is a tragic reminder for all of us of the urgent need for knowledge of the working environment. In order for us to properly represent our membership, we need to know what substances are used and produced by OCAW members and we need to know the short and long term health effects of those substances.
>
> As most of you already know from your own experiences, not all companies reveal toxicity information when it becomes available. Sometimes, it takes years. . . and lives before such life-saving data is revealed to the public and to workers.
>
> For this reason, I am alerting you now so that you, in cooperation with your health and safety committee and/or workman's committee, can begin gathering vital information on the hazards associated with substances to which members of your local union may be exposed. To this end, I am attaching a letter requesting such information under the representation responsibilities of the collective-bargaining agreement. *In submitting this letter to companies represented by OCAW members, I would ask that you put this letter on your own local union letterhead and submit it to the company exactly as written. Do not change or omit any of the items listed in the letter, as we want to pursue a consistent course of action with these letters.*
>
> I do not want to alarm you but only to alert you to the fact that there are many, many hazards in the workplace, both known and unknown, and workers are at the receiving end of those hazards.
>
> Remember, it is through your vigilance that we can act to prevent further tragedies such as the sterility crisis in the pesticides industry.

On November 16, 1977, the Union sent the aforementioned request for information to Respondent, as directed. The text of the request is as follows:

> This local union requests the company to submit the following information in order that it may properly carry out its representation responsibilities under the collective-bargaining agreement.
>
> (1) The morbidity and mortality statistics and basic data from which these were calculated on all past and present employees.[3]
> (2) The generic names of all substances used and produced at the Kansas City Colgate-Palmolive plant.
>
> BIOLOGICAL
>
> (3) All results of clinical and laboratory studies undertaken of any employee. All results of toxicological and experimental laboratory investigation concerned with toxicological agents that employees may be exposed to. This should include data available to company in these matters, whether or not undertaken by a company unit as well as all data relevant to these subjects to which the company is aware. Also all health related information derived from any insurance program covering employees covered under the collective bargaining agreement as well as all information concerning occupational illness and accident data related to workmen's compensation claims.
>
> It is agreed that review of this information will be undertaken by licensed physicians with medical confidentiality maintained with respect to any individual employee.
>
> INDUSTRIAL HYGIENE
>
> (4) Which contaminants are monitored by the company. The method of sampling used such as time integrated, spot sample, personal, breathing zone, fixed location. A sample protocol should be provided to the union. How does the company calibrate sampling rates on sampler. What is the analytical method, its sensitivity and the internal method of calibration. Does your laboratory participate in the P.A.T. program under NIOSH? All historical monitoring data (coded). Engineering control program, type of control, type of hoods and general exhaust information, design base, dilution volumes, volume of work area, capture velocity, exhaust volume and a statement stating effectiveness of control.
>
> Describe your hearing conservation program including periodic audiometric examination, noise level surveys and engineering control measures which are in effect.
>
> Describe the uses of radiation sources in the plant noting source type and activity if isotopes are used. Note machine sources of radiation. Indicate the radiation protection program in effect at the plant. List the incidents which require the notification to state and federal agencies. Describe monitoring.

[3] Respondent currently employs approximately 400 unit employees. In addition approximately 200 former employees have retired and another 200 employees have left Respondent's employ for other reasons.

> Indicate work areas which exceed the heat standard proposed in the NIOSH criteria document. Outline the engineering and medical control program in the plant designed to prevent heat disease.
>
> Please be assured that this local union requests the above information for the sole purpose of pursuing its representation responsibilities under the collective bargaining agreement.
>
> This local union will accept photostats of insurance carriers' reports, payroll records, or in any other written form convenient for the company to supply this information. The order in which the above questions have been asked is not to indicate their priority or to any way describe the format under which the company may choose to answer this request. It is merely a recitation of the information which the union believes it is entitled to under well-established NLRB precedents.
>
> This local union would appreciate receiving these statistics and information, or any part thereof which is readily available, as quickly as possible, in order that we may propose steps to be instituted in order to protect the health and lives of the bargaining unit personnel.

Rafael Moure, an industrial hygienist employed by the International Union, is responsible for evaluating occupational health hazards and for disseminating information and instituting programs for the benefit of the membership of the various local unions with respect to occupational health and safety. Additionally, Moure advises the International Union regarding its legal rights under Federal and state laws pertaining to occupational health. Moure, holding two master's degrees, one in science and chemical engineering, and one in science, environmental health and industrial hygiene, and currently a doctoral candidate in industrial hygiene, was instrumental in formulating the aforementioned request for information, and testified that he considered the requested material to be "essential health and safety information."

Moure testified that the request for information herein was not prompted by any safety or health problem involving Respondent, and that approximately 110 of 560 local unions, each apparently representing the employees of one employer, have sent the identical letter to those respective employers. Of this number about 45 or 46 employers, somewhat less than 50 percent, have resisted furnishing the information "in one fashion or another." Two employers have furnished information similar to that requested herein since 1972, having agreed to do so as a matter of contractual obligation.

Following receipt of the letter by Respondent, the parties had several meetings to discuss the request. The meetings were attended by various union representatives and by David R. Voysey, Respondent's plant manager, and John Zoog, employee relations manager for the Kansas City plant. At these meetings, Respondent took the position that it was not obligated to furnish any of the requested information, while the Union apparently insisted that all of the requested information, without exception or qualification, should be submitted to it. As a result of these firm positions of the parties there was very little discussion, if any, regarding possible modifications or methods of implementation of the request. On May 10, 1978, Respondent presented the Union with its written response, essentially stating what it had steadfastly maintained throughout the abbreviated meetings, as follows:

> In response to the OCAS [sic] request of November 16, 1977, we repeat our response provided at our meeting with you on February 24, 1978:
>
> > The Company . . . . will not be able to provide the information requested by the Union since it would be a tremendous burden on the Company to attempt to collect such data and that such request appears to be more of a fishing expedition than a specific question on a safety or health problem at the Kansas City Plant. Mr. Voysey stated although he cannot supply this information, he wants to assure the Union that any time they have a reasonable concern about safety or health matters for its members, the Company is interested in discussing it as it has in the past and will share appropriate information with the Union on a specific situation. . . .
>
> The Company is always interested in the safety and health of its employees and should the Union or any employee have a specific concern or question concerning such matters the Company is always ready to sit down and discuss the problem and, where necessary, take appropriate action.

The current collective-bargaining agreement between the parties extends from December 1, 1976, to December 1, 1979. The contract contains the following relevant provisions:

> PLANT SAFETY
>
> 1. The Company and the Union have agreed to the appointment of a joint safety committee whose purpose will be to cooperate on measures to increase the effectiveness of the plant safety program. The Union will appoint three (3) members on the Plant Safety Committee. No more than one Union member will be selected from a unit.
>
> 2. The Company and the Union agree to cooperate in eliminating unsafe conditions and unsafe practices.
>
> In the event an employee is assigned to a job which he considers to be unsafe, he may ask his foreman to contact his steward, the department manager, and the Safety Engineer to make an investigation. The job shall be declared safe before the employee is required to perform the job and his request for the investigation shall not be held against him.

2. The information requested

a. *Morbidity and mortality statistics*

Simply stated, the Union is requesting the health experience of all the employees of Respondent extending as far back as records exist, along with the death experience of the same group, in order to ascertain how the working environment has affected employees' health over the years. The necessity for these statistics, according to Moure, is mandated by the fact that certain occupational diseases, for example occupational cancer, may have a long latent period of perhaps 20 or 30 years prior to becoming manifest.

Moure testified that the Occupational Safety and Health Administration (OSHA) requires employers to periodically compile a log called OSHA form 200, which lists the instances of accidents and occupational diseases in a given plant. Moure stated that form 200 contains morbidity data similar if not identical to what is being requested by the Union, and would initially be quite useful to show the morbidity and mortality of employees. Moure added that, "We could improve on that type of information but it would be an acceptable beginning for the purpose of what we are trying to see, if the work environment has an effect on the health of people."

John Zoog, employee relations manager for the facility herein, testified that Respondent has prepared and maintained OSHA form 200 logs, or predecessor logs containing the same or similar information, since 1972 to the present date, that there are about 100 such documents, and that such logs are available for review by any employee or representative of employees. To retrieve and copy these documents, which apparently are not kept in a common file, would take about 4 hours.

Zoog testified that other morbidity statistics exist in the form of Kansas workmen's compensation accident reports and in Respondent's absentee records. The underlying data supporting the absentee reports consist of timecard documents, each encompassing a 2-year period. Respondent also has records from 1951 consisting of monthly turnover reports showing hires, retirements, terminations, and deaths, but not the cause of death. Further, Zoog estimated that since the plant commenced operations about 50 employees have died for whom insurance claims would have been filed under the group life insurance policy.

In summary, Zoog testified that, as Respondent interprets the Union's request, the Union is asking or some 9,460 morbidity records and 350 mortality records, and that it would take about 50 "man days" to retrieve this information.[4] Further, Zoog testified that had the Union made a specific request for the OSHA form 200 or predecessor logs, Respondent would have made the logs available, and that Respondent was unaware, because of the broad and ambiguous nature of the request, that the Union was asking for such logs.

b. *Generic names of all substances used and produced*

The Union is requesting the generic name, or descriptive chemical structure, of all the ingredients, rather than the trade or brand names of ingredients, used in the manufacture of products. Moure testified that under provisions of the Toxic Substances Act, administered by the Environmental Protection Agency, employers are required to submit such a list of chemicals to that agency.[5]

Martin Gilman, head of toxicology at Respondent's medical services department, a division of the research and development center, located in New Jersey, testified that research and development work on both final products and new ingredient materials is performed under the center's supervision, and is either performed at the center or contracted out. Testing for the preservation of consumer safety is performed on final formulations and not on individual ingredients, such testing being in conformity with the Consumer Product Safety Commission Labeling Act. Such test results for the last 3 years have been computerized, and are therefore apparently readily available. Gilman testified that there are about 150 individual ingredients used in products manufactured at the Kansas City plant, about 10 percent of which are proprietary ingredients. Proprietary ingredients are those which the supplying company regards as being in the nature of trade secrets, the generic descriptions of which are not divulged to customers such as Respondent. Respondent has requested suppliers to furnish safety data sheets on all ingredients, which documents, apparently in addition to containing generic names, also indicate oral toxicity, thermal toxicity, special handling requirements, and any particular known hazard of the ingredient. Sometimes Respondent never receives such safety data sheets from suppliers, and often, in the case of proprietary ingredients, the supplying company refuses to furnish the generic name of the substance. Gilman estimates that of the 150 ingredients used in the manufacturing process at the Kansas City plant, Respondent has safety data sheets containing varying amounts of information for some 125 ingredients.

Respondent also utilizes ingredients it considers to be confidential or in the nature of trade secrets. Gilman testified that certain color or fragrance substances give the final product a characteristic which competitors would like to duplicate, and that such ingredients are not readily discoverable by a chemical analysis of the final product. Gilman estimated that 3 to 4 percent of the 150 substances would be so classified by Respondent.

In summary, Gilman testified that it would take 2 to 3 man-days to compile a list of the generic names of nonproprietary and nonconfidential subtances used by Respondent in its manufacturing operations at the Kansas City plant; and that it would take about 1 man-day to gather and copy the aforementioned safety data sheets, which contain information on some 125 substances.

[4] Respondent defines a man-day as the work an employee can perform in one 8-hour day.

[5] Respondent's witnesses did not admit or deny such a contention.

c. *All results of clinical and laboratory studies undertaken of any employee*

Zoog testified that employees are given preemployment physical examinations which include urinalysis test, x-rays, and a medical history. Also there is a dispensary log kept on all employees who have occasion to visit Respondent's in-plant dispensary. Employees' medical files would include reports from company physicians as well as reports from personal physicians, and contain medical information of a highly personal nature. Thus, for example, the files may reflect past or current instances of venereal disease, mental illness, or reports from drug-related problems, as well as the surgical experiences and physical handicaps of employees. Respondent regards these medical files as highly confidential, and permits only limited access by authorized individuals; namely, Zoog, the company doctor, and nurse, the plant manager, and certain employees within the personnel department.

The record is unclear whether the Union is asking for the results of the aforementioned preemployment laboratory test. Moure's testimony indicates that the thrust of this request is directed toward obtaining the results of periodic medical screening programs, namely urine or blood analyses, which an employer may institute in order to biologically monitor the effect of a particular chemical on a group of employees. The record does not indicate that Respondent undertakes or has undertaken any such studies among its employees at the Kansas City plant.

The remainder of the Union's request in this area is also unclear. There is no testimonial evidence to clarify what type of "health related information, derived from any insurance program" the Union is requesting. Likewise, the precise nature of the Union's request for workers' compensation information is not spelled out in the record. Zoog testified that the insurance files and workers' compensation files are voluminous, consisting of some 12,000 documents, and that such files contain information which is medically confidential, being similar to the medical information contained in the employees' aforementioned medical files.

d. *Contaminants monitored by the Company*

Plant Manager Voysey testified that air sampling tests to monitor nuisance dust or levels of hazardous materials such as silica in the air are undertaken monthly at the present time. Tests for radiation leaks are made twice a year. The results of these air sampling and radiation tests are in readily available reports. There was a total plantwide noise-level test in 1972. Since that date noise levels have been monitored only when a question has arisen regarding the level of noise in a particular area, or sometimes upon the installation of new machinery. There apparently is no periodic audiometric examination of employees, although since January 1, 1978, new employees have routinely been given an audiogram test. Also, such a test has been administered to employees who have complained about hearing problems.

C. *Analysis and Conclusions*

The well-established proposition that an employer's obligation under the Act to furnish a collective-bargaining agent with requested information is limited only to the extent that the information requested must be potentially relevant to the Union's performance of its responsibilities on behalf of unit employees. *Westinghouse Electric Corporation*, 239 NLRB 106 (1978); *The East Dayton Tool and Die Company*, 239 NLRB 141 (1978). Moreover, the obligation to furnish information extends beyond contract negotiations to labor-management relations throughout the term of a collective-bargaining agreement. *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Hawkins Construction Company*, 210 NLRB 965, 966 (1974).

The health, safety, and physical well-being of employees is certainly no less important than wages and other benefits, and it cannot be gainsaid but that a refusal to bargain regarding health and safety matters is violative of the Act. Such bargaining between the parties herein culminated in the plant safety provisions included within the instant contract wherein the parties have agreed to commit themselves to mutual cooperation in eliminating "unsafe conditions and unsafe practices." Neither party contends such language is limited to industrial injuries. Rather, it seems clear that the parties contemplated the clause would apply to industrial illness and disease as well.

The Union's request for information is couched in broad all-inclusive language, and is obviously designed to encompass a broad spectrum of health and safety data the precise nature, existence, and parameters of which was then peculiarly within the knowledge and control of Respondent. There is no contention that the request was made to harass Respondent or was made other than in good faith. Obviously the request was not of such a nature that an immediate proffer of all the requested information could have reasonably been expected by the Union. However, the request appears sufficient to have at least occasioned a response by Respondent in fulfilling its aforementioned bargaining obligation which would have prompted further discussion or bargaining. Such discussions, once initiated, may have resulted in a mutually satisfactory solution to the instant matter.

However, the reply of Respondent did not invite discussion or bargaining, or even imply that Respondent would be amenable to such discussion. Rather, in effect, Respondent's reply amounted to an abrupt refusal to furnish any of the data unless applicable to a specific situation. John Zoog, Respondent's employee relations manager, testified as follows:

> A. To the best of my knowledge, our response has been to the entire letter, rather than to segments of the letter. I believe our response to the union has been one of we don't feel . . . that we can honor this request. However, if there were specific problems we would be glad to talk about them. I'm not aware of our response ever saying this particular aspect of the request, let's talk about it or for this aspect or this little aspect.

> Q. You have indicated then that you told them that you felt the request was huge, as you have characterized it. Did you ever tell them that there was any specific thing in the request that you didn't understand and that you wanted further information on?
>
> A. I'm not aware of any situation where we asked them to clarify, or that we didn't understand what the letter was asking for.

Thus, Respondent's reply to the Union's request for information did not afford the Union "either a guide to assist it in framing a more limited demand, or an incentive to do so in the expectation that a more limited demand would be honored." *Fawcett Printing Corporation*, 201 NLRB 964, 975 (1973).

Respondent maintains that it did not unqualifiedly refuse to furnish any of the requested data, but rather clearly advised the Union that it would discuss and share appropriate information in specific situations. Indeed Respondent's reply appears to comport with certain contractual language contained in the plant safety clause, which states that an employee assigned to a job he or she considers to be unsafe may ask that an investigation be made.

The Board has considered similar arguments and has found them to be without merit. Thus, in *Westinghouse Electric Corporation, supra*, the Board, citing *Robert J. Weber and Richard K. Weber d/b/a Weber Veneer & Plywood Company*, 161 NLRB 1054 (1966), states as follows:

> The Board . . . has rejected the contention that the right to relevant information is dependent upon the existence of a particular controversy or the processing of a specific grievance. As stated, the right includes all information which appears reasonably necessary to enable the Union to administer its agreement intelligently and effectively or to seek to modify it.

Nor does the contract language or the record as a whole constitute substantial evidence of the requisite "clear and unmistakable" waiver of the statutory right to such information. *N.L.R.B.* v. *The Item Company*, 220 F.2d 956 (5th Cir. 1955); *Westinghouse Electric Corporation, supra*; *The Timken Roller Bearing Company*, 138 NLRB 15 (1962), enfd. 325 F.2d 746 (6th Cir. 1963). Indeed, occupational illness or disease resulting from extended exposure to chemicals or environmental conditions in the workplace is, by its nature, exceedingly difficult to diagnose, and without proper information such as requested by the Union, and a subsequent thorough analysis of such information undertaken by individuals with expertise in such matters, the contractual provisions purportedly designed to protect employees from unsafe jobs would be rendered, in significant part, illusory.

Accordingly, for the reasons enunciated above, I find that Respondent has unlawfully failed and refused to bargain with the Union in good faith regarding its request for information, and that such conduct is violative of Section 8(a)(5) and (1) of the Act. While such an allegation does not specifically appear in the complaint, I deem the matter inextricably intertwined with Respondent's failure to furnish information, and further find that the matter has been fully litigated.

It appears, and I find, that the following records or data currently in the possession of Respondent are potentially relevant to the Union's performance of its responsibilities on behalf of the employees, and are neither confidential for proprietary or trade-secret reasons, too voluminous, costly or time-consuming to retrieve or gather under a general request for information, nor medical records which, I find below, Respondent is privileged to release only upon proper authorization by the employee: (1) All OSHA form 200 logs and predecessor OSHA form 100 and 102 logs from 1972 to the present; (2) a list of all the generic names of the approximately 130–140 chemicals or substances used in Respondent's production process which are not proprietary to the supplying company and which do not constitute Respondent's trade-secret ingredients; (3) the safety data sheets for the aforementioned chemicals or substances; (4) the safety data sheets for those proprietary chemicals or substances which do not reflect the generic name of the chemical or substance; (5) the reports or documents constituting periodic air sampling surveys and analyses for the past 5 years; (6) the documents constituting radiation survey or radiation leak test reports for the past 5 years; and (7) computerized results of the tests required by the Consumer Products Safety Commission on final formulations for the past 3 years.

The Union has apparently requested an abundance of data which either entirely or in part may be described as medical records, including records of preemployment physical examinations together with the results of laboratory tests, records of employees' visits to Respondent's dispensary, insurance files, and workers' compensation files. These records are considered confidential by Respondent and are treated as such with only limited access by authorized individuals. As noted above, they contain information of such a personal nature that it is reasonable to assume that employees would not voluntarily authorize their release. The Union in its initial request, realizing the confidential nature of the information, advised Respondent that "review of this information will be undertaken by licensed physicians with medical confidentiality maintained with respect to any individual employee." However, during the hearing Respondent apparently verbally modified this request, stating that the names and other identifying information could be deleted and the data could be coded in a manner to protect the privacy of the individual employee.

The Board, in dealing with the issue of medical records in *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382, 390 (1971),[6] stated as follows:

> As to the "Functional Capacity Record" which is a record of physical disabilities and infirmities of employees discovered by a physician in a physical examination, Respondent's position was that such records should not be publicized without the em-

[6] Modified on other grounds *sub nom. Lodges 743 and 1746 International Association of Machinists and Aerospace Workers, AFL–CIO* v. *United Aircraft Corporation*, 534 F.2d 422 (2d Cir. 1975), cert. denied 429 U.S. 825 (1976).

ployees' permission unless and until that individual's physical capacities become relevant to some particular problem. In view of the generally recognized confidential nature of a physician's report, we find that Respondent's position with respect to furnishing copies of such reports was reasonable one and did not violate Section 8(a)(5) of the Act.

Further, on July 21, 1978, the Occupational Safety and Health Administration (OSHA) published in the Federal Register[7] a proposed rule on "Access to Employee Exposure and Medical Records" which proposed rule is designed to provide employees, former employees, and their representatives, specifically including labor organizations, abundant health and safety related information. The purpose of the rule is declared to be as follows:

> . . . to provide the affected employees and their designated representatives, as well as OSHA and NIOSH, with access to this important safety and health information. The goals of occupational safety and health are not adequately served if employers do not fully share the available information on toxic materials and harmful physical agents with employees. Until now, lack of this information has too often meant that occupational diseases and methods for reducing exposures have been ignored and employees have been unable to protect themselves or obtain adequate protection from their employers. By giving employees and their designated representatives the right to see relevant exposure and medical information, this proposal will make it easier for employees to identify worksite hazards, particularly workplace exposures which impair their health or functional capacity. Increased awareness of workplace hazards will also make it more likely that prescribed work and personal hygiene practices will be followed.

Under the proposed OSHA rule, medical records are treated as follows:

> As for employee medical records, employees, former employees, and their designated representatives would have the right to examine and copy only those records of which the employee is the subject or for which written consent has been obtained from the subject employee.
>
> * * * * *
>
> In the absence of written consent, however, this proposal does not provide an employee or designated representative with access to medical records of other employees with related or comparable exposures. OSHA recognizes that these records could be important sources of information to a treating physician, industrial hygienist, epidemiologist, or other health researcher. Nevertheless, because of the often personal nature of information contained in medical records and the importance of encouraging candor between patient and physician, it believes that the privacy interest of an individual in his or her medical records must be paramount. Therefore, OSHA believes that written consent must be obtained from the subject employee before access can be gained to that employee's medical records.

Thus, it appears that both Board precedent and the proposed OSHA rule would not require medical records which would identify employees to be divulged pursuant to a general request for information absent employee consent. Further, the furnishing of such records in their current form, and particularly in coded form as the Union appears to suggest, would be overwhelmingly burdensome and costly and, in my opinion, would far exceed the potential benefit to the Union of such data. Moreover, the record is unclear regarding precisely what types of "clinical and laboratory studies" the Union is requesting. I therefore find that the Union's request for this information has properly been denied by Respondent.[8] See also *Detroit Edison Co.*, 440 U.S. 301 (1979).

From a careful reading of the proposed OSHA rule, it appears that the items catalogued above, which I have determined should be furnished by Respondent to the Union, would likewise be required by OSHA should the rule become effective.[9]

Regarding the other records or information requested by the Union, it appears that such data is not readily available in meaningful form, would be expensive to accumulate and provide, and/or is at least arguably proprietary or confidential trade-secret information. With regard to some of the latter, the Union will have obtained certain information regarding the chemicals or substances involved, but not their generic names, from the safety data sheets. Claims of confidentiality, made in good faith and substantiated by record evidence, may operate as a legitimate justification for refusal to furnish potentially relevant information, the ultimate determination resting upon the relative merit of the conflicting positions of the parties.[10] Further, once a determination has been made that the information should be furnished, limitations or qualifications on the use of such information have been left to the good-faith bargaining of the parties.[11] In the instant case, good-faith bargaining may lead to acceptable methods of furnishing such information while maintaining satisfactory safeguards to preserve

[7] 43 F.R. 31371, July 21, 1978.

[8] This finding should not be interpreted to mean that Respondent is relieved from its obligation to bargain over such matters, as the parties, through collective bargaining, may find a mutually satisfactory solution to the problem which would provide the Union with certain medical information while at the same time accommodating the concerns and interests of the employees and Respondent.

[9] Accommodation between the Act and OSHA is to be undertaken in a careful manner so as to preserve the objectives of each. See *Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31, 47 (1942); *Western Addition Community Organization* v. *N.L.R.B.*, 485 F.2d 917, 927–928 (D.C. Cir. 1973); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); Memorandum of Understanding between Department of Labor, Occupational Safety and Health Administration and National Labor Relations Board, 40 F.R. 26033, June 1975.

[10] See *Detroit Edison Co., supra; Fawcett Printing Corporation, supra*, 973–975.

[11] *The Ingalls Shipbuilding Corporation*, 143 NLRB 712, 718 (1963); *American Cyanamid Company (Marietta Plant)*, 129 NLRB 683, 684 (1960).

confidentiality. Thus, I find that the resolution of this matter should be left to the collective-bargaining process.

The information required to be furnished herein, together with the information adduced at the hearing, may cause the Union to withdraw or reexamine the remainder of its request for information, or may enable it to perfect a more specific request. As a result of Respondent's perfunctory refusal to furnish information, there has been no meaningful bargaining. Nor has the Union heretofore been apprised of the extent and availability of the information requested. It would appear that the collective-bargaining process would enable the parties to better formulate their respective positions, and that such discussions may result in Respondent's agreement to furnish certain information upon the payment of reasonable costs by the Union to Respondent for gathering and providing the information requested. Thus, I find that the remainder of the information requested by the Union and not specifically provided for herein is properly a matter of good-faith collective bargaining between the parties.[12]

CONCLUSIONS OF LAW

1. Colgate-Palmolive Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, Kansas City, Local No. 5-114, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Colgate-Palmolive Company at its facility located at 1806 Kansas Avenue, Kansas City, Kansas, excluding salesmen, buyers, office clerical employees, probationary employees, professional employees, technical employees, guards, watchmen, foremen, department managers, plant manager and other supervisors as defined in the Act constitute a unit apropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union regarding its request for the furnishing of health and safety information, which information is potentially relevant to the Union's performance of its representative responsibilities on behalf of unit employees.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by its failure to provide the Union with certain potentially relevant information, namely: (1) All OSHA form 200 logs and predecessor OSHA forms 100 and 102 logs from 1972 to the present; (2) a list of all the generic names of the approximately 130–140 chemicals or substances used in Respondent's production process which are not proprietary to the supplying company and which do not constitute Respondent's trade-secret ingredients; (3) the safety data sheets for the aforementioned chemicals or substances; (4) the safety data sheets for those proprietary chemicals or substances which do not reflect the generic name of the chemical or substance; (5) the reports or documents constituting periodic air sampling surveys and analyses for the past 5 years; (6) the documents constituting radiation survey or radiation leak test reports for the past 5 years; and (7) computerized results of the tests required by the Consumer Products Safety Commission on final formulations for the past 3 years.

6. Respondent has not violated Section 8(a)(5) and (1) of the Act, as alleged, by failing and refusing to furnish other requested information; rather the furnishing of such additional information, including the furnishing of medical information, is relegated to the collective-bargaining process.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, that it furnish the Union with the requested information specified above, that it bargain in good faith with the Union regarding the Union's request for additional information, and that it post an appropriate notice to employees.

[Recommended Order omitted from publication.]

[12] The record shows that the parties have maintained a highly satisfactory collective-bargaining relationship over many years, and there is no indication that the instant controversy could not be resolved to the parties' mutual satisfaction.